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In The

Supreme Court of the United States

LOUIS DEVINCENTIS,

Petitioner,

v.

KENNETH QUINN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. DeVincentis' maximum sentence (authorized by the fact of his convictions alone) was increased from 136 to 240 months after his sentencing court necessarily found new facts related to two prior convictions – facts not admitted or proved at the time of conviction. DeVincentis' sentence became final after *Apprendi v. New Jersey* and *Ring v. Arizona,* but before *Blakely v. Washington.*

1. Is the holding in *Blakely* a new rule or is it dictated by *Apprendi* and *Ring*?

2. If *Blakely* is a new rule, does its requirement of proving facts resulting in an increased maximum sentence to a jury beyond a reasonable doubt apply retroactively?

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PETITION FOR A WRIT OF CERTIORARI

Louis DeVincentis respectfully petitions for a writ of *certiorari* to review the judgment of the Ninth Circuit Court of Appeals.

OPINION BELOW

The decision of the Ninth Circuit is not reported. The slip copy can be found at *DeVincentis v. Quinn*, 2008 WL 399303 (9th Cir. 2008). The order is reproduced at App. 1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions:

> The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."
>
> The Fourteenth Amendment to the United States Constitution provides in relevant

part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Procedural History

In 1999, Louis DeVincentis was charged and convicted in King County Superior Court with one count of Rape of a Child in the Second Degree and one count of Child Molestation in the Second Degree. Based on the two crimes of conviction alone, DeVincentis had a "standard range" of 102-136 months.

However, at sentencing the State alleged and the trial court found that DeVincentis had two convictions from New York "comparable" to Washington felony sex offenses. As a result, DeVincentis' "standard range" was elevated to 210-280 months. The trial court sentenced DeVincentis to twenty years in prison (240 months) on May 3, 2000. ER 33.

DeVincentis appealed. On June 10, 2002, the Washington Court of Appeals affirmed DeVincentis' convictions and sentences. *State v. DeVincentis,* 112 Wn. App. 152, 47 P.3d 606 (2002). The Washington Supreme Court granted review and on August 14, 2003, affirmed the lower court's decision. *State v. DeVincentis,* 150 Wash.2d 11, 74 P.3d 119 (2003).

On September 7, 2004, DeVincentis filed a state post-conviction petition, called a Personal Restraint

Petition (PRP), in the Washington Court of Appeals. That petition included the issue raised in this petition. On January 6, 2006, the Washington Court of Appeals issued an order dismissing the PRP on its merits. Review was denied by the Washington Supreme Court on April 5, 2006.

On May 15, 2006, DeVincentis filed a petition for writ of *habeas corpus* in the United States District Court for the Western District of Washington. On April 5, 2007, United States District Court Judge Robart dismissed DeVincentis' petition. DeVincentis filed a timely notice of appeal and a motion for a certificate of appealability (COA) on April 14, 2007. On May 16, 2007, the district court granted DeVincentis' COA request in part.

On February 13, 2008, the Ninth Circuit issued a memorandum opinion affirming the district court's decision. DeVincentis' motion for rehearing or rehearing *en banc* was denied on March 19, 2008. This petition for writ of *certiorari* timely follows.

B. Relevant Facts

DeVincentis was convicted in New York of first-degree sexual abuse in 1980 and second-degree sexual abuse in 1984. In 1980, first-degree sexual abuse in New York was defined as "subjecting another person to sexual contact" provided that person was less than eleven, physically helpless, or incapable of consenting. N.Y. Penal Law, Art. 130.66. In 1984, New York similarly defined second-degree sexual

abuse as subjecting "another person to sexual contact" when that person is "incapable of consent by reason of some factor other than being less than seventeen years old; or less than fourteen years old." N.Y. Penal Law, Art. 130.60. In contrast to the New York offenses, the most similar Washington crime requires proof of non-marriage between the defendant and victim.

As a result of this difference, the State urged DeVincentis' sentencing judge to go beyond the facts proved beyond a reasonable doubt at the time of each conviction in New York and to review additional "documents, testimony, and arguments" in order to find the missing non-marriage element necessary to a comparability determination. The trial court agreed with the State; found both crimes comparable; and imposed a sentence based on the increased standard range.

REASONS THE WRIT SHOULD BE GRANTED

A. Introduction

DeVincentis' "standard range" was increased when his sentencing judge found new facts related to his prior convictions. DeVincentis' judgment became final on August 13, 2003. In his state post-conviction and federal habeas petitions, DeVincentis argued that his sentence violated his Sixth Amendment right to jury trial based on the rule announced in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,*

536 U.S. 584 (2002). Alternatively, DeVincentis argued that this Court's decision in *Blakely v. Washington,* 542 U.S. 296 (2004), should be applied retroactively.

While the Ninth Circuit agreed with DeVincentis' factual premise, the court rejected his legal claim concluding, even "if the sentence was based on judicial factfinding," the "increased sentence did not violate clearly established federal law" at the time DeVincentis' sentence became final. The court further held that *Blakely* does not apply retroactively, citing its earlier decision in *Schardt v. Payne,* 414 F.3d 1025 (9th Cir. 2005).

Although this case does not involve an "exceptional" sentence above the "standard range," it nevertheless involves an increase to the "standard range" based on facts (other than the fact of conviction) found by a judge, not a jury. Thus, this case squarely presents two related and important issues: (1) whether *Blakely* applied the rule created in *Apprendi* and *Ring*; and, if not, (2) whether *Blakely* applies retroactively.

B. The Washington Sentencing Scheme

Under the Washington Sentencing Reform Act, a defendant's sentencing range is based in part on an "offender score," which is calculated based on prior felony convictions, including any out-of-state convictions that are "comparable" to Washington offenses. *See* Wash. Rev.Code § 9.94A.525(3). To determine

whether an out-of-state offense is comparable to a Washington offense, the trial court compares the elements of the two crimes. *In re Lavery,* 154 Wash.2d 249, 111 P.3d 837 (2005). If the elements of the foreign conviction are substantially similar to the elements of a Washington offense, the foreign crime counts toward the offender score as if it were the comparable Washington offense. *Id.*

At the time that DeVincentis was sentenced, state caselaw provided, where the foreign crime is broader than the Washington crime, the current sentencing court can look beyond the judgment to "other court documents" and decide for the first time by a preponderance of the evidence "whether the defendant's conduct would have violated a Washington statute." *State v. Morley,* 134 Wash.2d 588, 610-11, 952 P.2d 167 (1998). Based on this caselaw, the State successfully argued to DeVincentis' sentencing judge that she could find the "missing" facts necessary to a comparability finding, *i.e.,* that he was not married to the victim – facts that were neither admitted nor proved at the time of either conviction in New York.

C. The Right to a Jury Trial Where Factfinding Results in an Increased Maximum Sentence

As a result of the increase to his maximum sentence based on facts found by a judge, DeVincentis claimed a violation of his Sixth Amendment right to

jury trial relying either on the rule announced in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,* 536 U.S. 584 (2002), and alternatively arguing that *Blakely v. Washington,* 542 U.S. 296 (2004) applies retroactively. DeVincentis expands on those arguments in order.

1. DeVincentis Does Not Rely on a New Rule

In *Teague v. Lane*, 489 U.S. 288 (1989), the plurality opinion explained when a case announces a "new" rule:

> In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

Id. at 301 (citations omitted). This Court ratified this general test later that same Term, *see Penry v. Lynaugh*, 492 U.S. 302, 314 (1989), and has reaffirmed its formulations many times since. *See, e.g., Beard v. Banks*, 542 U.S. 406, 413 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997).

By contrast, a decision does not announce a new rule when it is "merely an application of the principle that governed" a prior Supreme Court case. *Teague*, 489 U.S. at 307. As Justice Kennedy has explained, "we ask whether the decision in question was dictated

by precedent" in recognition of "[t]he comity interest served by *Teague*." *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment). If a decision of this Court was not dictated by precedent existing at the time the state prisoner's conviction became final, a federal court should not upset the finality of the conviction because the state court did not have fair notice that it was acting unconstitutionally. But if "all reasonable jurists" would have realized such precedent compelled the holding in the later decision, there is nothing unfair or subversive of federalism in applying the later decision to the prisoner's federal habeas claim. *Beard*, 542 U.S. at 413 (quoting *Lambrix*, 520 U.S. at 528).

Teague itself provided an example of a decision that simply applied the rule that governed a prior case and, therefore, did not announce a new rule: *Francis v. Franklin*, 471 U.S. 307 (1985), cited in *Teague*, 489 U.S. at 307. In *Francis*, this Court held that a jury instruction that allowed the jury to presume malice unconstitutionally relieved the state of its burden of proof beyond a reasonable doubt. It explained its decision this way:

> *Sandstrom v. Montana* [442 U.S. 510 (1979)] made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in [*In re Winship*, 397 U.S. 358 (1970)] on the critical question of intent in a criminal prosecution.

> 442 U.S. at 521. Today we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed.

Francis, 471 U.S. at 326-27. Notwithstanding the dissent's complaint that *Francis* "needlessly extend[ed] our holding in [*Sandstrom*] to cases where the jury was not required to presume conclusively an element of a crime under state law," *id.* at 332 (emphasis added) (Rehnquist, J., dissenting), this Court held unanimously three years later that *Francis* did not announce a new rule because it "was merely an application of the principle that governed our decision in *Sandstrom v. Montana*." *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988), quoted in *Teague*, 489 U.S. at 307.

Post-*Teague* decisions from this Court reinforce that merely applying a rule announced in a prior Supreme Court case does not announce a new rule. In *Stringer v. Black*, 503 U.S. 222 (1992), this Court held that its decision in *Maynard v. Cartright*, 486 U.S. 356 (1988), did not announce a new rule because it "applied the same analysis and reasoning" found in a prior case. *Stringer*, 503 U.S. at 228. That prior case, *Godfrey v. Georgia*, 446 U.S. 420 (1980), had held that the aggravating factor of an "outrageously or wantonly vile, horrible or inhuman" offense was unconstitutionally vague for purposes of determining eligibility for the death penalty. Although *Maynard* involved an aggravator with slightly different language – whether

the offense was "especially heinous, atrocious, or cruel" – this Court explained in *Stringer* that "it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case." 503 U.S. at 228-29. The key, this Court explained, was that "[i]n applying *Godfrey* to the language before us in *Maynard*, we did not 'brea[k] new ground.'" *Stringer*, 503 U.S. at 229 (quoting *Butler v. McKellar*, 494 U.S. 407, 412 (1990)).

Stringer also concluded that this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990), did not announce a new rule. Although this Court acknowledged that "there are differences in the use of aggravating factors under the Mississippi capital sentencing system [at issue in *Clemons*] and their use in the Georgia system in *Godfrey*," the Court explained that "those differences could not have been considered a basis for denying relief in light of precedent existing at the time petitioner's sentence became final." *Stringer*, 503 U.S. at 229. Because the rule adopted in *Godfrey* compelled the outcome in *Clemons*, *Clemons* did not announce a new rule.

Finally, this Court held in *Penry, supra*, that the relief a state prisoner sought would not create a new rule because it was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), both of which were decided before the prisoner's conviction became final. *Penry* sought relief based on the proposition that when a capital defendant presents mitigating evidence of mental

retardation and an abused background, courts must "give[ ] jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death." *Penry*, 491 U.S. at 315. Both *Lockett* and *Eddings* had held that sentencers in capital cases could not be precluded from considering certain potentially mitigating evidence. Even though those cases dealt with different kinds of mitigating evidence, this Court concluded that the rule *Penry* sought was "dictated by *Eddings* and *Lockett*." *Penry*, 492 U.S. at 319.

This Court's recent applications of past decisions to new sets of facts confirm that when an established rule governs a certain dispute, that rule does not implicate *Teague*. In *Williams v. Taylor*, 529 U.S. 362 (2000), for example, this Court applied its decision in *Strickland v. Washington*, 466 U.S. 668 (1984), to a petitioner's federal habeas claim. This Court explained:

> That the *Strickland* test "of necessity requires a case-by-case examination of the evidence," *Wright*, 505 U.S. at 308 (Kennedy, J., concurring in judgment), obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent "dictated" that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim. *Teague*, 489 U.S. at 301. And it can hardly be said that recognizing the right to effective counsel

> "breaks new ground or imposes a new obligation on the States."

Williams, 529 U.S. at 391 (quoting *Teague*, 489 U.S. at 301). Even though the precise basis for Williams' contention that he received ineffective assistance was different than the petitioner's in *Strickland*, Williams was nonetheless entitled to a full application of *Strickland's* general rule. *Id.* This Court recently reached a similar result in *Miller-El v. Dretke*, 545 U.S. 231 (2005), applying the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), to a new set of facts.

There can be no doubt, therefore, that Petitioner is entitled to apply the rule of *Apprendi* and *Ring* in his habeas petition. And to the extent the holding of *Blakely* flowed from simply applying *Apprendi* and *Ring* to a sentencing system that was different in form but not in kind from the one in *Apprendi*, Petitioner is entitled to the benefit of *Blakely* as well.

2. Blakely Did Not Announce a New Definition of "Maximum" Sentence

This Court's opinions in *Apprendi*, *Ring* and *Blakely*, as well as a comparison between the underlying sentencing laws at issue in those cases, demonstrate that *Blakely* simply applied the rule already announced in *Apprendi* and *Ring*. It did not break new ground in holding that Washington's procedures for finding the facts supporting sentences above the standard range were unconstitutional.

In *Apprendi*, this Court considered the legality of New Jersey's system for imposing a certain "sentence enhancement." Under that system, a defendant convicted of a given crime was subject to a statutorily established maximum sentence (in Apprendi's case, 10 years). A second statute, however, provided that a sentencing court could impose "an extended term" of imprisonment – up to 20 years – if it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or group on the basis of race or a similar characteristic. 530 U.S. at 468-69.

This Court in *Apprendi* ruled that New Jersey's sentence-enhancement system ran afoul of the Sixth and Fourteenth Amendments, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. But this Court did not stop there.

This Court explained that the "statutory maximum" in a given sentencing scheme is the statute setting "the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 483 (emphasis added); see also *id.* at 483 n.10 (the statutory maximum is the statutory "outer limit[ ]" based on "the facts alleged in the indictment and found by the jury"). *Apprendi* explained, in other words, that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment

than that authorized by the jury's guilty verdict?" *Id.* at 494 (emphasis added). Because the hate-crime enhancement at issue there "increased . . . the maximum range within which the judge could exercise his discretion," this Court held that the trial court erred in imposing the enhancement based on a fact that it found by a mere preponderance of the evidence. *Id.* at 474; see also *id.* at 491-92.

Nevertheless, it is correct to say that *Apprendi* involved an increase to the traditional statutory maximum, and not the top end of a statutorily established range. However, if that is the constitutional distinction drawn by *Apprendi*, *Ring* erased it.

The range of statutorily available punishment upon conviction in *Ring* was life or death. Thus, imposition of a death sentence in *Ring* was not an increase to the "traditional" maximum. Ring was convicted by a jury of first-degree murder. Under Arizona law the maximum penalty for first-degree murder is death. 536 U.S. at 592. However, under Arizona law, Ring could not receive a death sentence unless further findings were made, namely the existence of at least one aggravating circumstance. *Id.* Thus, the question posed in *Ring* was "whether that aggravating factor may be found by the judge, as Arizona law specified, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." 536 U.S. at 597. *Ring* held that a jury determination was constitutionally required because

a death sentence was not authorized if punished according to the facts reflected in the jury verdict alone. *Id.*

The fact that *Ring* overruled *Walton v. Arizona*, 497 U.S. 697 (1990), a case that the *Apprendi* court reconciled and reaffirmed, underscores this point. The key distinction between the hate crime enhancement in *Apprendi* and the death penalty scheme in *Walton*, according to *Apprendi*, was that a conviction of first-degree murder in Arizona carried a statutory maximum sentence of death. "[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." *Apprendi,* 530 U.S. at 497 (emphasis deleted). In other words, *Apprendi* reconciled the denial of a jury trial in *Walton* because Walton was sentenced within the "range of punishment authorized by the jury verdict," no jury trial was required. *Ring* eliminates this "range of punishment" distinction. Thus, the "standard range" distinction that the State argued below did not exist until *Blakely*, clearly existed in *Ring*.

Two years later, in *Blakely*, this Court confronted Washington's system for imposing exceptional sentences. Under that system, a defendant convicted of a given crime or crimes was subject to a statutorily established "standard," or "presumptive," statutory range. A second statute, however, empowered sentencing courts to impose a longer – so-called "exceptional"

– sentence if they found one or more "aggravating facts" beyond those encompassed in the guilty verdict. See *Blakely*, 542 U.S. at 299-300. This Court held that the Washington system was unconstitutional in the same way as the New Jersey system in *Apprendi* had been.

One need look no farther than the language in *Blakely* itself to understand that *Blakely* did nothing more than apply the rule of *Apprendi* and *Ring*. At the outset of its analysis, this Court explained that:

> This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

542 U.S. at 301 (emphasis added). The State argued that the "statutory maximum" in Washington's system was not the statute setting the maximum sentence based solely on the guilty verdict (in Blakely's case, 53 months), but instead was the statute establishing the maximum possible exceptional sentence (10 years). *Id.* at 303.

This Court, however, rejected the State's argument, holding in no uncertain terms:

> Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected

> in the jury verdict or admitted by the defendant.

542 U.S. at 303 (first emphasis added); compare *Yates*, 484 U.S. at 216-17 (*Francis* did not announce new rule in part because it explained that prior precedent "made clear" that state's argument lacked merit). For this proposition, this Court cited and quoted *Apprendi's* statement that the statutory maximum is the statute setting "the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Blakely*, 542 U.S. at 303 (quoting and citing *Apprendi*, 530 U.S. at 483).

Lest there be any doubt that *Blakely* broke no new legal ground, this Court further explained that "[t]he 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime)." *Blakely*, 542 U.S. at 304 (emphasis added). This Court's "commitment to *Apprendi* in this context" reflected nothing more than "respect for longstanding precedent" and a continuing need to give "intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305; compare *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (*Apprendi* rule is necessary to give "intelligible content" to jury trial right).

This Court has noted that dissents from decisions also can illuminate whether those decisions announced new rules. See *Beard*, 542 U.S. at 415; *O'Dell v. Netherland*, 521 U.S. 151, 158-59 (1997). No dissent

in *Blakely* disputed that *Apprendi* compelled the result the Court reached. The most any dissenter claimed was simply that this Court in *Blakely* made clear "it mean[t] what it said in *Apprendi*." *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting). Making clear that a prior opinion meant what it said, however, does not announce a new rule. The opinion must "break[ ] new ground" in some way necessary to its holding. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Nothing in *Blakely* did so.

Instead of basing their disagreement on the holding in *Blakely*, therefore, the *Blakely* dissenters directed their ire at the rule of *Apprendi* itself. See, *e.g.*, 542 U.S. at 321 (O'Connor, J., dissenting) (explaining that the "*Apprendi* dissenters" were unwilling to follow its rule here); *id.* at 333 (Breyer, J., dissenting) (criticizing what sentencing systems have to do to conform "to *Apprendi's* dictates"); compare majority opinion at 306 (referring to dissenters as "[t]hose who would reject *Apprendi*"). That presumably is why Justice O'Connor went so far as to concede that, on the basis of *Teague's* "dictated by precedent" principle, "all criminal sentences imposed under [systems similar to Washington's] since *Apprendi* was decided in 2000 arguably remain open to collateral attack." 542 U.S. at 323-24 (O'Connor, J., dissenting) (citing *Teague*, 489 U.S. at 301, for the proposition that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final").

All that was necessary to reach the result in *Blakely*, in short, was to recognize the definition of "statutory maximum" announced in *Apprendi* and *Ring* and to apply it with equal force to a sentencing system that was colloquially known as a "sentencing guidelines" system. See Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221, 252-55 (2005) (*Apprendi* "foreordained" the result in *Blakely*; "[a]ll the Court had to do to decide *Blakely* was to apply the rule exactly as *Apprendi* had stated it."); R. Craig Green, *Apprendi's Limits*, 39 U. Rich. L. Rev. 1155, 1169-82 (2005) ("the Court simply restated and applied Apprendi's rule" in an "identical" manner).

In holding that *Blakely* established a new rule, the Ninth Circuit ignored the definition of "statutory maximum" that *Apprendi* already had announced and this Court's admonition to focus not on form, but on effect of sentencing laws. The Ninth Circuit reasoned that *Blakely* announced a new rule because "[e]very [federal] circuit court of appeals that addressed the question presented in *Blakely* reached the opposite conclusion from the rule subsequently announced by the Supreme Court." *Schardt*, 414 F.3d at 1035. In other words, the Ninth Circuit believed that *Blakely* announced a new rule because the holding in *Apprendi* did not dictate this Court's eventual holding in *United States v. Booker*, 543 U.S. 220 (2005), that the system in the Federal Sentencing Guidelines for enhancing sentences was unconstitutional.

This analysis, however, fails to appreciate the difference between the Washington sentencing system at issue in *Blakely* and the Federal Sentencing Guidelines. The holding in *Blakely* was not the same as the holding in *Booker*. Indeed, to the extent *Booker* is relevant here, this Court's analysis there confirms that the holding in *Blakely* was dictated by *Apprendi* and *Ring*, regardless of whether the holding in *Booker* was so dictated.

The Federal Sentencing Guidelines, on the other hand, do not present a situation of dueling statutory maximums. For any given federal crime, the United States Code establishes a single maximum permissible sentence. The Guidelines (in their binding form prior to *Booker*) limited judicial discretion to impose sentences up to such maximums not by statute, but by "quasi-legislative" rules enacted by an independent commission in the judicial branch. See *Mistretta v. United States*, 488 U.S. 361, 393 (1989). As Justice Thomas' concurrence in *Apprendi* indicated, therefore, the "unique status" of the Guidelines kept them from squarely implicating *Apprendi's* "statutory maximum" rule and – for a time, at least – raised the possibility that they might be exempt from the *Apprendi* doctrine. 530 U.S. at 523 n.11 (Thomas, J., concurring).

The division of authority that *Blakely* triggered in the federal circuits concerning the constitutionality of the federal Guidelines underscores that even though the *Apprendi* rule did not neatly apply to the Guidelines, it did map directly onto Washington's

"standard range" system. Some circuits, including the Ninth Circuit, concluded that because Washington's system took the form of a guidelines system, the Federal Sentencing Guidelines must be unconstitutional as well. See *United States v. Ameline*, 376 F.3d 967, 975-78 (9th Cir. 2004); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004). But other circuits and judges reasoned that because *Blakely*, like *Apprendi*, actually involved only "statutory sentencing thresholds," the decision could not be read as dictating that the Guidelines were invalid. *Booker*, 375 F.3d at 520 (Easterbrook, J., dissenting); see also *id.* ("*Apprendi* and *Blakely* hold that the Sixth Amendment commits to juries all statutory sentencing thresholds."). The Fourth Circuit, in fact, emphasized that considering "the factual and legal context in which *Blakely* was decided," *Blakely* "not only did not change the inquiry we must make, it also adhered to the rule the Court had announced in *Apprendi*." *United States v. Hammoud*, 381 F.3d 316, 348-50 (4th Cir. 2004) (*en banc*).

Booker, to be sure, resolved this conflict in favor of robustly construing the *Apprendi* doctrine to cover binding thresholds in both statutory and non-statutory sentencing systems. But this Court never disagreed with the analysis of *Blakely* in opinions like the Fourth Circuit's. Indeed, this Court's reasoning in *Booker* further confirmed that *Blakely* – if not necessarily *Booker* – was dictated by *Apprendi*. The *Booker* Court first reiterated that "the requirements of the Sixth Amendment were clear" in *Blakely*. 543 U.S. at 232 (emphasis added). It then acknowledged that, in

contrast to *Blakely*, "the language used in our holding in *Apprendi*" did not squarely cover the Federal Sentencing Guidelines because the Guidelines' sentencing thresholds are not statutory. *Booker*, 543 U.S. at 238. This difference required this Court to assess the general "principles [*Apprendi*] sought to vindicate." *Id.* After doing so, this Court held that the Sixth Amendment fact-finding requirements in *Apprendi* should apply "[r]egardless of whether the legal basis for the accusation is in a statute or in guidelines promulgated by an independent commission." *Id.* at 239.

Justice Breyer's opinion dissenting in part (for the same four Justices who dissented in *Blakely*) echoed this analysis. Unlike the dissenting opinions in *Blakely*, which had accepted that the result there was compelled by *Apprendi*, Justice Breyer's dissent in *Booker* argued that there was actually a "principled basis for refusing to extend *Apprendi's* rule" to the Guidelines. *Booker*, 543 U.S. at 334 (Breyer, J., dissenting in part). That basis, the dissent explained, was that the Guidelines involve mere "administrative rules," so they do not allow Congress to label factual inquiries that should be elements as sentencing factors and thereby evade the beyond-a-reasonable-doubt and jury-trial guarantees. *Id.* at 330-32. Furthermore, administrative rules created by a commission in the Judicial Branch resemble appellate decisionmaking concerning the reasonableness of sentences, which falls outside of *Apprendi's* rule. To the extent *Blakely* could be read as implying that the

Apprendi doctrine should apply with equal force to such rules, *Blakely* did not have to extend *Apprendi* in that manner because "*Blakely*, like *Apprendi*, involved sentences embodied in a statute." *Booker*, 543 U.S. at 332 (Breyer, J., dissenting in part).

In sum, the inquiry whether *Apprendi* dictated *Blakely* is not the same as whether *Apprendi* dictated *Booker*. This Court need not address here whether *Apprendi* dictated *Booker*. The only question here is whether the holding of *Blakely*, *i.e.*, that when there are two statutory sentencing thresholds, the statutory maximum for Sixth and Fourteenth Amendment purposes is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," 542 U.S. at 303 – was dictated by *Apprendi*. There can be no doubt that the answer is "yes."

3. If *Blakely* Announced a New Rule, It Announced a Watershed Rule of Criminal Procedure.

If this Court were to determine that the holding in *Blakely* somehow established a new rule, then *Teague* still would not bar applying it to Petitioner's claim because the *Blakely* rule qualifies as a "watershed rule [] of criminal procedure." *Teague*, 489 U.S. at 311. This exception to the general bar on retroactively applying new rules of criminal procedure to state prisoners gives life to Justice Harlan's observation – echoed contemporaneously by Justice Powell

and Judge Friendly and in later years repeatedly by this Court – that a central purpose of federal habeas review is to ensure that "no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting), quoted in *Teague*, 489 U.S. at 312; see also *Stone v. Powell*, 428 U.S. 465, 491-92, n.31 (1976) (habeas rules should "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"); Henry Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151-52 (1970) (same); *O'Neal v. McAninch*, 513 U.S. 432, 442 (1995) (the "basic purposes underlying the writ" include addressing "the sort [of constitutional error] that risks an unreliable trial outcome and the consequent conviction of an innocent person"); *Bousley v. United States*, 523 U.S. 614, 620 (1998) (same). This concern, of course, encompasses not only imprisoning individuals who are innocent of committing any crime but also those who committed some transgression but are innocent of a more serious offense for which a state is punishing them. Even when a state court's infringement of a constitutional rule was not apparent while a case was on direct review, federal courts must apply a "watershed" rule retroactively, in short, to address the "impermissibly large risk," *id.*, that a person may be serving prison time for something he did not do.

"To fall within this exception, a new rule must meet two requirements: [1] Infringement of the rule

must seriously diminish the likelihood of obtaining an accurate conviction, and [2] the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (internal quotations and citations omitted). The *Blakely* rule that facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits must be proven to juries beyond a reasonable doubt satisfies each of these tests.

The *Apprendi/Ring/Blakely* rule has two distinct components: the requirement that facts authorizing a sentence above an otherwise binding statutory threshold be found beyond a reasonable doubt, and the requirement that those facts be found by a jury. See *Apprendi*, 530 U.S. at 476-78; *Blakely*, 542 U.S. at 301. Although this Court held in *Schriro v. Summerlin*, 542 U.S. 348 (2004), that infringing the jury-trial component of *Apprendi's* rule (and by implication, *Ring* and *Blakely's* rule) does not seriously diminish the likelihood of obtaining an accurate conviction, there is no question that infringing the reasonable doubt component of the *Apprendi/Ring/Blakely* rule does so.

In a pair of pre-*Teague* cases, in fact, this Court already reached this conclusion while conducting the very same accuracy-diminishing inquiry that *Teague* later adopted. Initially, this Court addressed in *Ivan V. v. City of New York*, 407 U.S. 203 (1972), the question whether, under its old retroactivity jurisprudence, failing to apply the beyond-a-reasonable-doubt

rule of *In re Winship*, 397 U.S. 358 (1970), "substantially impairs [a criminal trial's] truth-seeking function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Ivan V.*, 407 U.S. at 204. This Court held that it did, because "the major purpose" of using the constitutional standard of proof beyond a reasonable doubt instead of a preponderance standard is "to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." *Id.* at 205; see also *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (reasonable doubt standard "developed to safeguard men from dubious and unjust convictions"). Several years later, again applying the same test, this Court made clear that failing to use the reasonable doubt standard even with respect to only one element of a crime "substantially impairs the truth-finding function" of trial just as impermissibly as failing to use that standard across the board. *Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977). "The reasonable-doubt standard of proof is as 'substantial' a requirement under [*Mullaney v. Wilbur*, 421 U.S. 684 (1975)] as it was in *Winship*" because failing to use that standard with respect to a single element raises equally "serious questions about the accuracy of guilty verdicts in past trials." *Id.* at 243-44.

These holdings make eminent sense and control here. Whereas the reasonable doubt standard requires a fact-finder to "reach[ ] a subjective state of certitude of the facts in issue," the preponderance standard "calls on the trier of fact merely to perform

an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *Winship*, 397 U.S. at 364, 368 (quotation and citation omitted). It follows ineluctably that using a preponderance standard instead of the reasonable doubt standard presents "a far greater risk of factual errors that result in convicting the innocent." *Id.* at 371 (Harlan, J., concurring) (emphasis added); see also *Lego v. Twomey*, 404 U.S. 477, 493 (1972) (Brennan, J., dissenting) ("Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent."). And this Court made clear in *Apprendi* and *Blakely* that even when a jury has found a defendant guilty beyond a reasonable doubt of a certain crime, the same inordinate level of risk is present when courts use a preponderance standard to assess whether the defendant should be punished more severely than a jury verdict alone allows. See *Apprendi*, 530 U.S. at 484-85; *Blakely*, 542 U.S. at 306, 311-12.

The Ninth Circuit nevertheless opined in the case that controlled its decision here that infringing on the *Blakely* rule does not seriously undermine the likelihood of obtaining an accurate conviction because the rule "does not affect the determination of a defendant's guilt or innocence" but rather "addresses only how a court imposes a sentence, once a defendant has been convicted." *Schardt*, 414 F.3d at 1036 (quoting *United States v. Price*, 400 F.3d 844, 848 (10th Cir.

2005)). But this statement ignores the very holdings of *Blakely*, *Apprendi*, and *Ring*. Those decisions hold that a "sentence enhancement" or "aggravating factor" that exposes a defendant to a longer sentence is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494 n.19; see also *Blakely*, 542 U.S. at 310-11 (repeatedly referring to sentence enhancements covered by *Blakely* as "elements"); *Washington v. Recuenco*, 548 U.S. 212 (2006) (holding of *Apprendi* is that "elements and sentencing factors must be treated the same for Sixth Amendment purposes"). In other words, a State may not "circumvent the protections of *Winship* merely by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" *Apprendi*, 530 U.S. at 485 (quoting *Mullaney*, 421 U.S. at 698). Accordingly, the constitutional violation that *Blakely* addresses is failing to use the proper procedural protections (specifically, a jury and the beyond a reasonable doubt standard) for determining whether a facts exist that make a defendant guilty of a crime. That is exactly the sort of error that this Court has made abundantly clear seriously diminishes the likelihood of obtaining an accurate conviction.

The Ninth Circuit also erred in holding that the *Blakely* rule does not satisfy the "bedrock" prong of *Teague's* watershed exception. The court concluded that neither the beyond-a-reasonable-doubt component nor the jury-trial component of the rule involves

"the sort of error that necessarily undermines the fairness . . . of judicial proceedings." *Schardt,* 414 F.3d at 1036 (quotations and citations omitted). Both of these conclusions are mistaken. Each of the components of the *Blakely* rule independently satisfies this prong of *Teague's* watershed exception.

The due process requirement that facts exposing defendants to punishment beyond otherwise applicable statutory maximums must be found beyond a reasonable doubt is a "bedrock procedural element essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (quotation and citation omitted). This Court's opinion in *Winship* leaves little doubt that the reasonable doubt standard is indispensable to any criminal adjudication:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. . . . [A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

397 U.S. at 363 (emphasis added) (quotation and citation omitted); see also *id.* at 372 (Harlan, J., concurring) (using reasonable doubt standard instead of a preponderance of the evidence standard is "an expression of fundamental procedural fairness . . . for criminal trials"); *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (The reasonable doubt standard "is an ancient and honored aspect of our criminal justice system."); *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979) (a conviction that does not satisfy so "fundamental a substantive constitutional standard" cannot stand).

Applying the reasonable doubt standard is just as important in the context of factual findings, as in *Blakely*, that expose defendants to punishment beyond otherwise applicable statutory maximums as it is with respect to other elements of crimes. This Court reiterated in *Apprendi*, in just this context, that the reasonable doubt standard is a "constitutional protection[] of surpassing importance." 530 U.S. at 476. Without this rule, a defendant guilty of doing something wrong – but not something as serious as the government alleged – could see his sentence "balloon . . . based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report complied by a probation officer who the judge thinks more likely got it right than wrong." *Blakely*, 542 U.S. at 311-12; see also *id.* at 306 (dispensing with the *Blakely* rule "would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of possessing the firearm used to

commit it – or of making an illegal lane change while fleeing the crime scene."). Such a regime would controvert our most fundamental conceptions of liberty.

Even if the beyond-a-reasonable-doubt component of *Blakely's* rule did not implicate the bedrock procedural elements essential to the fairness of a proceeding, the jury-trial component of the rule would. While the Ninth Circuit suggested that this Court's decision in *Schriro* foreclosed such a conclusion, see *Schardt*, 414 F.3d at 1036, this is incorrect. *Schriro* held only that requiring a jury to find a fact exposing a defendant to heightened punishment did not satisfy the accuracy prong of *Teague's* watershed exception, see *Schriro*, 542 U.S. at 355-58; this Court did not address the "bedrock" prong. A straightforward application of that prong dictates that the jury-trial component of *Blakely's* rule satisfies it.

This Court has never wavered from the proposition that the right to trial by jury – a right that is "several centuries" old – is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149-51 (1968); see also *Schriro*, 542 U.S. at 358 ("The right to jury trial is fundamental to our system of criminal justice."). It "reflect[s] a fundamental decision about the exercise of official power," as well as "a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155-56. The jury is indispensable because it is the one decisionmaker

that "stands between the individual and the power of the government." *Booker*, 543 U.S. at 237.

If this Court's recent decisions have made anything clear, it is that the right to jury trial is just as important in the context of factual determinations that expose defendants to heightened punishment as it is during the rest of trial. This Court explained in *Blakely* that the principle that juries must find every fact "the law makes essential of the punishment" has been "acknowledged by courts and treatises since the earliest days of graduated sentencing." *Blakely*, 542 U.S. at 302 (quotation and citation omitted). It continued:

> That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.

542 U.S. at 305-06 (emphasis added). Like the right to counsel at issue in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which this Court has identified as a watershed rule, see *Beard*, 542 U.S. at 417-18, the right to a jury determination concerning every fact the law makes essential to punishment "may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon*, 372 U.S. at 344.

If there were any doubt that the *Blakely* rule satisfies the bedrock prong of *Teague's* watershed exception, the combination of the reasonable doubt and jury-trial components would remove it. It is a truly rare decision of this Court that draws from the wellspring of two such fundamental elements of the American system of criminal justice. Indeed, the extraordinary pedigree of the *Blakely* rule makes finding it a watershed rule entirely consistent with this Court's frequent observation that it is "unlikely that many such components of basic due process have yet to emerge." *Beard*, 542 U.S. at 417 (quoting *Graham*, 506 U.S. at 478 (quoting in turn *Teague*, 489 U.S. at 313)). This Court's holdings in *Apprendi*, *Ring*, and *Blakely* did not discover any new constitutional rights. Rather, they required States that, in recent years, had adopted "novel[]" sentencing systems to reinstitute ancient procedural protections that States otherwise had followed since the founding and that had been recognized throughout the "uniform course of decision during the entire history of [this Court's] jurisprudence." *Apprendi*, 530 U.S. at 482-83, 490; see also *id.* at 501-18 (Thomas, J., concurring) (recounting common law jurisprudence in state courts); *Booker*, 543 U.S. at 236-37 (discussing States' recent shift in sentencing practices). As recently as 1980, in fact, the Washington Supreme Court had affirmed that "[o]ur cases involving . . . enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty." *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121

(1980). The upshot of this history is that it is even more justifiable to apply a decision like *Blakely* retroactively than it would to apply a decision, such as *Gideon*, that created a new constitutional rule that States had no prior notice even existed.

That is not to say, of course, that every state prisoner sentenced in violation of *Blakely* should obtain federal habeas relief. Even within the presumably small group of those who are still in prison and procedurally able to raise such a claim in federal court, many will not be able to show that *Blakely* violations in their cases had a "substantial and injurious effect or influence" on their judgments. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). But this reality does not give reason for refusing altogether to apply *Blakely* retroactively to such prisoners' claims. Convictions infringing the *Blakely* rule present "an impermissibly large risk," *Teague*, 489 U.S. at 312 (*quoting Desist*, 394 U.S. at 262 (Harlan, J., dissenting)), that the State of Washington is punishing someone for more serious conduct than he actually committed. A core purpose of the Great Writ is to provide a forum for identifying and remedying such injustices.

CONCLUSION

This Court has previously granted *certiorari* to determine whether *Blakely* announced a new rule and, if so, whether it applies retroactively to cases on collateral review only to conclude that procedural barriers prevented this Court from reaching the merits. *Burton v. Stewart,* 549 U.S. 147 (2007). This petition borrows heavily from the briefing in that case, due to the factual similarities between the cases – aside from the successor issue present in *Burton*. Thus, this case presents an opportunity to finally decide that important issue.

For the forgoing reasons, this Court should grant DeVincentis' petition for a writ of *certiorari.*

DATED this 17th day of June, 2008.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS DEVINCENTIS, Plaintiff-Appellant, v. KENNETH QUINN, Defendant-Appellee.	No. 07-35396 D.C. No. C06-680-JLR-JPD MEMORANDUM* (Filed Feb. 13, 2008)

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted December 4, 2007
Seattle, Washington

BEFORE: MCKEOWN and CLIFTON, Circuit Judges, and SCHWARZER,** District Judge

Louis DeVincentis appeals the district court's order denying his petition for a writ of habeas corpus and dismissing his action. We affirm.

We review de novo the district court's decision to deny a habeas petition. *Dows v. Wood,* 211 F.3d 480,

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

484 (9th Cir. 2000), cert. denied, 531 U.S. 908 (2000). Habeas relief may be granted only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). Under the "contrary to" clause, the petition may be granted if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring). Under the "unreasonable application" clause, the petition may be granted if the state court identifies the correct legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer v. Andrade,* 538 U.S. 63, 75 (2003) (citations omitted).

DeVincentis argues that his trial counsel was deficient in failing to call his children and wife as witnesses to rebut the testimony of a prior victim, V.C., whose testimony was admitted to show a common scheme or plan to molest young girls.

The state court's decision that DeVincentis failed to establish ineffective assistance of counsel was not an unreasonable application of the law. The state

court concluded that trial counsel made a reasonable judgment in "declining to call witnesses whose impartiality could be questioned and through whom DeVincentis's past abuse might be further explored." The state court further held that trial counsel adopted a reasonable strategy of arguing at the pretrial hearing that the offenses against V.C. were not sufficiently similar to satisfy the "common scheme or plan" test and that trial counsel sought to impeach V.C.'s testimony by questioning her about inconsistencies in her statements. The state court reasonably concluded that trial counsel's decision not to further investigate potential testimony by DeVincentis's family members was supported by "reasonable professional judgments." *Strickland v. Washington,* 466 U.S. 668, 691 (1984).

Even if trial counsel's performance had been deficient, the state court reasonably concluded that DeVincentis failed to establish prejudice. There is no reasonable probability that the trial court would have excluded V.C.'s testimony had DeVincentis's wife and children testified. *See Lowry v. Lewis,* 21 F.3d 344, 346-47 (9th Cir. 1994). Their testimony would not have rebutted several aspects of V.C.'s testimony that the trial court found relevant to a common scheme or plan, including that DeVincentis asked both V.C. and K.S. for massages, that he asked both girls to hold or massage his penis, that he asked both if his lack of dress bothered them, that he told both girls not to tell anyone about his behavior, and that he told each girl on at least one occasion to take her clothes off.

Furthermore, the rebuttal testimony would have substantiated key points in V.C.'s testimony. including that DeVincentis showed nude pictures to V.C., and that he sat behind V.C. on an exercise machine.

Even if the trial court had excluded V.C.'s testimony, the Washington Supreme Court was not objectively unreasonable in concluding that there is no reasonable possibility that DeVincentis would have been acquitted. Although the trial court found that V.C.'s testimony corroborated K.S.'s testimony, the court also credited other corroborating evidence, including the testimony of K.S.'s mother and two of K.S.'s friends. The court made detailed findings regarding the specific events surrounding DeVincentis's abuse of K.S., findings it could make only based on K.S.'s testimony and the testimony of her mother and friends. The state court was not objectively unreasonable in concluding that there is no reasonable probability that DeVincentis would have been acquitted had the trial court heard the rebuttal testimony.

The district court did not abuse its discretion in refusing to grant an evidentiary hearing because, even assuming the truth of the supporting declarations, DeVincentis has not made a persuasive claim that his attorney's performance was deficient or that there was prejudice to the outcome of his trial.

Finally, DeVincentis argues that his sentence violates his Sixth Amendment right to jury trial. Under the Washington Sentencing Reform Act, a

defendant's sentencing range is based in part on an "offender score," which is calculated based on prior felony convictions, including any out-of-state convictions that are comparable to Washington offenses. *See* Wash. Rev. Code § 9.94A.525(3). To determine whether an out-of-state offense is comparable to a Washington offense, the trial court first compares the elements of the two crimes. *In re Lavery,* 111 P.3d 837, 841 (Wash. 2005). "If the elements of the foreign conviction are comparable to the elements of a Washington . . . offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense." *Id.* If the elements of the two crimes are not "substantially similar," the court may review the indictment or information for the out-of-state offense to determine if the defendant's conduct would have violated a comparable Washington law. *Id.*

DeVincentis argues that his sentence violates his right to jury trial under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), because his sentence was increased based on facts found by a judge rather than a jury. The trial court included two prior New York convictions for sexual abuse in DeVincentis's offender score after finding that the offenses were comparable to the Washington crime of indecent liberties. The Washington offense of indecent liberties requires proof that the victim is not the defendant's spouse, an element that is not required for conviction in New York. DeVincentis argues that the trial court must have

found that his New York victim was not his spouse in order to find the conviction comparable to the Washington offense of indecent liberties and that such judicial factfinding violates his right to jury trial.

We disagree. Even if the sentence was based on judicial factfinding, the increased sentence did not violate clearly established federal law at the time DeVincentis's sentence became final. This case falls squarely within our holding in *Schardt v. Payne,* 414 F.3d 1025 (9th Cir. 2005). In *Schardt,* the petitioner argued, as DeVincentis does here, that his sentence violated *Apprendi* because the trial judge imposed a sentence greater than the standard range based on judicial factfinding. *Id.* at 1032. We held that prior to the Supreme Court's decision in *Blakely v. Washington,* 542 U.S. 296 (2004), it was not a violation of clearly established federal law to impose a sentence greater than the standard sentencing range but within the statutory maximum based on findings made by a judge rather than a jury. *Schardt,* 414 F.3d at 1035, 1037. *Blakely* established for the first time the rule that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely,* 542 U.S. at 303. We also held in *Schardt* that *Blakely* may not be applied retroactively on collateral review to a conviction that was final before *Blakely* was decided. *Schardt,* 414 F.3d at 1038. DeVincentis's conviction became final in 2003, before the Supreme Court's decision in *Blakely.* Accordingly, his sentence

did not violate his Sixth Amendment right to a jury trial at the time his conviction became final

AFFIRMED

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of LOUIS DEVINCENTIS, Petitioner.	NO. 78320-9 RULING DENYING REVIEW (Filed Apr. 5, 2006)

Louis DeVincentis was convicted in 2000 of second degree child rape and second degree child molestation. Division One of the Court of Appeals affirmed the convictions on direct appeal, and this court also affirmed. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Mr. DeVincentis subsequently filed a personal restraint petition in the Court of Appeals, arguing that his trial counsel was ineffective in not calling witnesses at a pretrial hearing to rebut the testimony of a former victim, whose testimony was ultimately admitted to show a common scheme or plan. Mr. DeVincentis also argued that counsel incompetently failed to inform him of his right to testify at the hearing, and that the trial court improperly found two out-of-state convictions comparable to Washington crimes for offender score purposes. Finding these claims meritless, the acting chief judge of the Court of Appeals dismissed the petition.[1] Mr.

[1] The acting chief judge had originally dismissed the petition as untimely. But because the petition was in fact timely filed, this court granted discretionary review and remanded to the Court of Appeals for consideration of the petition on the merits. No. 77234-7.

DeVincentis now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

The current crimes were committed against a 12-year-old girl. To prove a "common scheme or plan" to molest young girls in a particular manner, *see* ER 404(b), the State sought to admit the testimony of V.C., the victim in Mr. DeVincentis's 1983 New York conviction (by guilty plea) of endangering the welfare of a child. In *DeVincentis,* this court summarized V.C.'s testimony from the pretrial hearing:

> V.C. testified that in 1983 she was 10 years old and the best friend of DeVincentis' daughter. V.C. spent three or four evenings a week at DeVincentis' home and he was usually present, wearing nothing but bikini or g-string underwear. V.C. testified that the sight of DeVincentis in small underwear became normal to her. After a birthday party for DeVincentis' daughter, DeVincentis took V.C. to his bedroom and showed her pictures of naked people. He asked her if she had seen a penis before. DeVincentis was wearing bikini briefs, and he asked V.C. if it bothered her that he was dressed like that.
>
> On another occasion, DeVincentis had V.C. sit on his home rowing machine. DeVincentis sat behind her and she felt what she now understands to be his erection pressing against her back. On this occasion he also "put[ ] his hand in [her] private areas and pressed down on them hard." DeVincentis then showed her another exercise machine

> and touched her chest and private area and pressed his erection against her back. On another occasion, DeVincentis demanded that V.C. try on transparent, mesh-like clothing. DeVincentis stored books and magazines with pictures of nude people throughout his house where his daughter and V.C. could find them. Once he offered V.C. $10 to pose for a nude picture like one in a magazine.
>
> V.C. testified that she had memory flashes of being naked with DeVincentis in his bedroom and him asking for back massages. V.C. also testified that she had memory flashes of DeVincentis putting his erection on her and in her mouth and that he ejaculated on her.

DeVincentis, 150 Wn.2d at 15 (citation omitted). The trial court found this testimony admissible as showing a common scheme or plan to get to know young girls through a safe channel, gradually to desensitize them to his appearance in bikini underwear, and then to bring them into an apparently safe and isolated environment where he could abuse them.[2] This court affirmed. *Id.* at 22-24.

Mr. DeVincentis now argues that his attorney was ineffective in failing to seek out and present the testimony of his daughter, his son, and his former wife to rebut V.C.'s pretrial testimony and

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[2] The court excluded other past instances of sexual abuse offered by the State.

demonstrate that his claimed abuse of V.C. had nothing in common with his current crimes. In a declaration, Mr. DeVincentis's daughter, M., says that V.C. was not her best friend and that she can "only remember a few times when [V.C.] was over at our house." Declaration of M. DeVincentis at 2. M. asserts that her father did not "generally" walk around the house in underwear, that she did not see him wearing bikini or g-string type underwear, and that she never saw him wearing only underwear when V.C. was present. *Id.* at 2-3. She denies that her father ever molested her or that she ever told V.C. of any molestation, and she denies that V.C. ever told her of being molested. M. recalls seeing her father behind V.C. on an [sic] belt massager, but she says she did not see any inappropriate touching. She also remembers V.C. saying that Mr. DeVincentis had shown her magazines containing nudity. According to M., her father's attorney asked her before trial what she generally remembered about V.C. being over at her house, and she responded, "'not much.'" *Id.* at 4.

Mr. DeVincentis's son, J., echoes that V.C. was not a "regular visitor at our house." Declaration of J. DeVincentis at 1. He says his father sometimes wore briefs and a t-shirt when exercising, but did not wear colored underwear and did not walk around the house in his underwear. Jason never saw his father engage in sexual contact with M. or V.C.

Mr. DeVincentis's former wife, Barbara DeVincentis, says that, after Mr. DeVincentis was arrested for improper behavior with a young girl in 1980, she

became "very watchful" of him. Declaration of Barbara DeVincentis at 1. She asserts that she never saw him engage in inappropriate behavior with V.C. She says that V.C. was not one of M.'s closest friends and did not live in the same neighborhood. Ms. DeVincentis also states that Mr. DeVincentis did not walk around the house in his underwear and did not wear bikini or g-string briefs. She acknowledges that in 1983 she was out of town for six weeks for flight attendant training.

Mr. DeVincentis demonstrates no obvious or probable error in the acting chief judge's rejection of his ineffective assistance claim. The upshot of these declarations is that none of the declarants saw Mr. DeVincentis abuse V.C., but none says that it did not happen or could not have happened. M. admits she told defense counsel she did not remember "much" about V.C. being at her home, and she actually confirmed that her father once was with V.C. on an exercise machine and that her father had shown V.C. nude magazines. And all three declarants confirmed that Barbara DeVincentis was out of town for six weeks, when the abuse of V.C. allegedly occurred. As for the declarants' assertion that Mr. DeVincentis never wore colored bikini briefs, Mr. DeVincentis admitted, when he pleaded guilty to the crime against V.C., that he stripped down to black bikini briefs. He also pleaded guilty to another offense at that time, admitting that he wore red bikini underwear when he committed the crime. And in his own declaration, Mr. DeVincentis says that had he been

permitted to testify at the pretrial hearing, he would have admitted that he "took [V.C.] to his bedroom, removed all of my clothing except my underwear, showed her a book with some pictures of nude adults, and asked her if she wanted to pose with me for money." Declaration of Louis DeVincentis at 2.

The declarations Mr. DeVincentis submits thus do not substantially undermine the crucial aspects of V.C.'s testimony. Counsel was not professionally deficient in declining to call witnesses whose impartiality could be questioned and through whom Mr. DeVincentis's past abuse might be further explored. Rather, counsel pursued the reasonable strategy of arguing that the acts against V.C. were not sufficiently similar to the present crimes to be admissible, and in highlighting during trial the inconsistencies in the statements V.C. had given over the years. And even if these declarants had been called, there is no reasonable probability that the outcome would have been different. *See State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. DeVincentis next contends that counsel was ineffective in failing to inform him of his constitutional right to testify at the ER 404(b) hearing. But he cites no authority suggesting he had a constitutional right to testify at that hearing. Indeed, he had no right to a hearing at all. *State v. Kilgore,* 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002). And again, Mr. DeVincentis says that, had he testified, he would have admitted committing the abuse against V.C. that his family members say they never observed. Mr.

DeVincentis demonstrates no actual and substantial prejudice stemming from constitutional error. *See In re Pers. Restraint of Lord,* 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

Finally, Mr. DeVincentis contends that he had a right to have the jury determine the comparability of two New York convictions to Washington crimes for purposes of calculating his offender score. *See* RCW 9.94A.525(3) (for offender score purposes, out of state convictions to be classified according to comparable Washington offenses). But if the elements of the out-of-state convictions are substantially the same as the elements of comparable Washington crimes, those convictions may be counted by the sentencing court without further inquiry. *In re Pers. Restraint of Lavery,* 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Mr. DeVincentis was convicted in New York of first and second degree sex abuse. He fails to demonstrate that those crimes are not comparable to any Washington "sex offenses," which count as three points in the offender score. *See* RCW 9.94A.525(16) (if current crime a sex offense, each prior sex offense counts three points). Mr. DeVincentis argues that the trial court improperly went beyond the fact of the prior convictions or the facts necessarily proven or admitted in procuring those convictions. *See Lavery,* 154 Wn.2d at 256-58 (if foreign crime not legally comparable to Washington crime, court may not look to facts of foreign crime neither admitted by defendant nor necessarily proven beyond a reasonable doubt). But Mr. DeVincentis does not show that to be the case.

In sum, the acting chief judge did not obviously or probably err in dismissing the personal restraint petition. The motion for discretionary review is therefore denied.

/s/ Geoffrey Crooks
COMMISSIONER

April 5, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS DEVINCENTIS, Petitioner-Appellant, v. KENNETH QUINN, Respondent-Appellee.	No. 07-35396 D.C. No. C06-680-JLR-JPD Western District of Washington, Seattle ORDER (Filed Mar. 19, 2008)

Before: McKEOWN and CLIFTON, Circuit Judges, and SCHWARZER*, District Judge.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.